Public Prosecutor v Syed Feisal Bin Yahya

HIGH COURT (JOHOR BAHRU) — CRIMINAL SUIT NO MT(4) 45-30-2004
AHMAD ZAIDI IBRAHIM J
20 APRIL 2007

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a), s 2 — Trafficking in dangerous drugs — Prosecution to prove beyond reasonable doubt that subject matter was cannabis — Whether prosecution had proven its case

Criminal Procedure — Trial — Joint trial — Accused pleaded guilty to second amended charge of possession — First trafficking charge withdrawn by Public Prosecutor — Whether the withdrawn charge can be 'taken into account' — Whether sentence appropriate — s 6, s 39A(2) Dangerous Drugs Act 1952 (DDA) — s 121A, s 171, s 171A & s 298 Criminal Procedure Code (CPC)

The accused was charged with two counts of trafficking in dangerous drugs under s 39B(1)(a) Dangerous Drugs Act 1952 (DDA). The accused claimed trial and a joint trial was fixed for both charges. The prosecution called three witnesses and thereafter, the trial was adjourned. At the date of continued hearing, the Deputy Public Prosecutor, tendered an alternative charge of possession for the second case and the accused pleaded guilty. The accused was found guilty and convicted by the judge of possession of dangerous drugs. The Deputy Public Prosecutor then applied to withdraw the first case of trafficking which was allowed by the judge and the accused was acquitted in the first case. During the submissions for sentencing, the DPP applied to Court to 'take into consideration' the offence for the first case which had been withdrawn under s 171A of the CPC. The accused consented to the same. The learned DPP submitted that the fact a case is no longer pending or outstanding is immaterial and has no bearing.

Held:

(1) The operative words of s 171A CPC are that the Court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed. Thus, the Court in exercising that discretion may only consider cases which are still pending or outstanding in the court.

(2) Having considered all the relevant factors, I accordingly sentenced the accused to 15 years imprisonment to take effect from the date of his arrest. A lighter sentence I feel would make a mockery of the principle of sentencing and the

A intention of Parliament. As for the sentence of whipping, pursuant to s 289(c) CPC the accused being 51 years of age was not ordered to be whipped.

[Bahasa Malaysia summary

B Tertuduh telah didakwa dengan dua pertuduhan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya (ADB). Tertuduh meminta dibicarakan dan perbicaraan bersama telah ditetapkan untuk kedua-dua pertuduhan. Pendakwa telah memanggil tiga orang saksi dan selepas itu, perbicaraan telah ditangguhkan. Pada tarikh sambung bicara, Timbalan Pendakwaraya, telah mengemukakan Pertuduhan pilihan memiliki bagi pertuduhan kedua dan tertuduh C telah mengaku salah. Tertuduh telah didapati bersalah dan disabitkan oleh Hakim kerana memiliki dadah berbahaya. Timbalan Pendakwaraya kemudiannya memohon untuk menggugurkan kes pertama kerana mengedar, yang telah dibenarkan oleh hakim dan tertuduh telah dibebaskan daripada kes pertama. Semasa hujahan untuk hukuman, Timbalan Pendakwaraya telah memohon kepada mahkamah untuk D 'mengambilkira' kesalahan untuk kes pertama, yang telah digugurkan di bawah s 171A KTJ. Tertuduh juga bersetuju dengan perkara yang sama. TP yang bijaksana menghujahkan bahawa fakta kes yang masih lagi belum diselesaikan adalah tidak material dan tidak bernilai.

E

Diputuskan:

(1) Penguatkuasaan perkataan-perkataan dalam s 171A KTJ adalah mahkamah dalam menentukan dan menjatuhkan hukuman, mungkin, dengan kebenaran pendakwaraya dan tertuduh, mengambilkira kesalahan-kesalahan yang belum F selesai atau kesalahan-kesalahan yang mana tertuduh telahpun mengaku melakukannya. Oleh itu, mahkamah dalam mengamalkan budibicaranya akan hanya menimbangkan kes-kes yang masih tergantung/belum diselesaikan di mahkamah.

(2) Setelah mempertimbangkan faktor-faktor yang sewajarnya selanjutnya G menghukum tertuduh dengan 15 tahun penjara berkuatkuasa daripada tarikh tangkap. Hukuman yang lebih ringan saya rasa akan memperolok-olokan prinsip hukuman dan niat Parlimen. Berkenaan hukuman sebatan, menurut s 289(c) KTJ tertuduh yang berumur lima puluh satu (51) tidak diperintahkan untuk disebat.]

H

Notes

For cases on joint trial, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4450–4487.

For cases on ss 2 and 39B(1)(a) of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 137–141.

I

Cases referred to

Abang Zailan bin Abang Zainal v PP [1992] 1 MLJ 225 (refd)
Flady bin Dading v PP [1994] 3 CLJ 738 (refd)
Hashim bin Pawanchee & Anor v PP [1988] 2 MLJ 66 (refd)

Mohamad Abdullah Angsweekang v PP [1987] 2 CLJ 405 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
PP v Sidek Abdullah [2006] 3 MLJ 357 (refd)
PP v Sulaiman bin Ahmad [1993] 1 MLJ 74 (refd)
PP v Yap Huat Seng [1985] 2 MLJ 414 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)

Legislation referred to
Dangerous Drugs Act 1952 (DDA) s 39B(l)(a)
Criminal Procedure Code s 121A, 171, 298(2)

Ahmad Akram Bin Gharib (Deputy Public Prosecutor, Johor Bahru) for the prosecution.
Puan Rohaya Binti Halil for the accused.

Ahmad Zaidi bin Ibrahim J:

BACKGROUND

[1] The accused was charged with two counts of trafficking in dangerous drugs under s 39B(l)(a) Dangerous Drugs Act 1952 (DDA). He was charged under two separate cases viz, MT [1] 45-27-2004 (the first case) and MT [4] 45-30-2004 (the second case). The two respective charges are as follow:

(i) Perbicaraan Jenayah No. MT(1) 45-27-2004 (the first case)

> Tuduhan Pindaan Bahawa kamu pada 24 Mei 2003, jam lebih kurang 12.30 tengahari, di Jalan Sempadan, Kampung Melayu Majidee, Majidee, di daerah Johor Bahru, di Negeri Johor Darul Takzim, telah didapati mengedar dadah berbahaya iaitu sejumlah 933 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(l)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

(ii) Perbicaraan Jenayah No MT(4l 45-30-2004 (the second case)

> Tuduhan Pindaan Bahawa kamu pada 24 Mei 2003, jam lebih kurang 9.30 malam, No 18, Jalan Anggerik 26, Taman Johor Jaya, di daerah Johor Bahru, di Negeri Johor Darul Takzim, telah didapati mengedar dadah berbahaya iaitu sejumlah 54,571.18 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(l)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] He claimed trial to both charges and the cases were fixed for joint-trial before me. During the trial, the prosecution called three witnesses. The cases were then adjourned for continuation.

[3] On the date fixed for continued hearing on 3 April 2007, the learned Deputy Public Prosecutor (DPP), Encik Ahmad Akram bin Gharib tendered an alternative charge for the second case to which the accused pleaded guilty. The alternative charge reads as follows: Perbicaraan Jenayah No MT(4) 45-30-2004

A Tuduhan Pilihan Bahawa kamu pada 24 Mei 2003, jam lebih kurang 9.30 malam, No. 18, Jalan Anggerik 26, Taman Johor Jaya, di daerah Johor Bahru, di Negeri Johor Darul Takzim telah didapati memiliki dadah berbahaya iaitu sejumlah 54,572 gram cannabis, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 6 Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39A(2) Akta yang sama

B

[4] The learned DPP then went on to tender the facts of the case together with the relevant exhibits, all of which were admitted by the accused as true. Accordingly, I found the accused guilty and convicted of the said alternative charge.

C **[5]** At that juncture the learned DPP applied to the Court to withdraw the first case. As such, by virtue of s 171 Criminal Procedure Code (CPC), I accordingly acquitted and discharged the accused of the said charge.

[6] With regards to the second case which he pleaded guilty, the accused mitigated for leniency, giving grounds/factors commonly adduced by most accused person. D The prosecution in turn pressed for a heavy sentence to be imposed onto the accused. Apart from that, the learned DPP also applied to Court to 'take into consideration' the offence for the first case. According to the learned DPP, the accused has no objection for the said offence/charge be taken into account. The learned DPP then invited the Court to confirm the said matter with the accused and his counsel as E required by s 171A CPC.

[7] Having considered the matter, with respect, I found that the application by the prosecution under that particular section is without merit and baseless. I found that the said provision is inapplicable in the circumstances of this case and as such I F rejected the application.

[8] As for the second case, I sentenced the accused to 15 years imprisonment effective from the date of his arrest. The accused being 51 years of age at the time of sentence was spared the sentence of whipping by virtue of s 298(2) CPC.

G ISSUES

[9] Whether the court, in absence of any objection by the accused can/may for the purpose of sentencing 'take into consideration' an offence/charge which had earlier been withdrawn and to which the accused had been acquitted and discharged?

H

[10] Whether the sentence imposed for the second case was appropriate in the circumstances?

DECISION

I

[11] First Issue - 'taking into consideration'

As provided by s 121A CPC, for the purpose of sentencing, the court is given the discretion as to whether or not to take into consideration other offences pending against the accused person. In the case of *Abang Zailan Bin Abang Zainal v PP* [1992]

1 MLJ 225 at p 227 Chong Siew Fai J had this to say: '... s 171A(i) uses the word 'may'. In *R v Smith*, Darling J, in explaining the duty of the presiding judge said:

> ...A judge is not bound, in passing sentence, to take into account other charges pending against a prisoner. In Syres 73 JP 13; 25 TLR 71; 1 Cr App R 172: 1908, it was decided that a judge may, in passing sentence, take into account other charges which a prisoner admits.

[12] For ease of reference on this issue s 171A Criminal Procedure Code(CPC) are set out as follows:-

(i) Where in any criminal proceedings instituted by or on behalf of the public prosecutor the accused is found guilty of an offence, the Court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed provided that, if any criminal proceedings are pending in respect of such outstanding offence or offences and such proceedings were not instituted on behalf of the public prosecutor, the Court shall first be satisfied that the person or authority by whom such proceedings were instituted consents to that course.

(ii) When consent is given as in subsection (i) and an outstanding offence is taken into consideration, the Court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been set aside, be liable to be charged or tried of any such offence so taken into consideration.

[13] Relying on the above provision the learned DPP urged the Court to take the charge/offence in the first case into consideration on account that the accused had consented to it. To support his argument he cited cases of *Flady bin Dading v Public Prosecutor* [1994] 3 CLJ 738 and *Hashim bin Pawanchee & Anor v Public Prosecutor* [1988] 2 MLJ 66.

[14] In *Flady bin Danding*, the facts of the case are somewhat similar to our present case in that the accused there was initially charged with two offences. In the course of the trial, the accused changed his plea and chose to plead guilty to the first charge. Both the prosecuting officer and the counsel then informed the court that they had no objection if the second charge be taken into consideration under s 171A of the CPC for the purpose of sentencing.

[15] According to Ian H.C Chin J '..it follows from the wordings: offence or offences which the accused admits to have committed' (in s 171A of the Criminal Procedure Code) that the court must establish by inquiry that the accused admits his guilt with regard to the outstanding offence which, in this case is the offence related in the second charge. To do this, the court must in open court ask the accused whether he admits to the offence related in the second charge'.

[16] The learned DPP, quoting the above passage invited the Court to ask the accused as to whether or not he admits to the offence/charge for the first case, as both

A the prosecution and counsel had consented. The learned DPP submitted that the fact a case is no longer pending/outstanding is immaterial and has no bearing.

[17] With respect, after having perused through the wordings of s 171A CPC, to me, it is plain to see that before the Court exercised its discretion, apart from parties B consenting, the other offence or offences to be taken into consideration must be one that is still outstanding or pending before the Court.

[18] The operative words of s 171A CPC are that the Court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take C into consideration any other outstanding offence or offences which the accused admits to have committed. Thus, the Court in exercising that discretion may only consider cases which are still pending or outstanding in the court. In the two cases cited by the learned DPP above, it is crystal clear that cases taken into consideration are cases still pending/outstanding before the respective courts, unlike in our case where it had been withdrawn.

D

[19] As earlier mentioned, the learned DPP relying on the provision of s 171(1) CPC exercised the prosecution's prerogative to withdraw the charge for the first case. Flowing from that the accused must be acquitted as s 171 of the Criminal Procedure Code provides that:

E

> (1) When more charges than one are made against the same person and when a conviction has been had on one or more of them, the officer conducting the prosecution may, with the consent of Court, withdraw the remaining charge or charges, or the Court of its accord may stay the inquiry into or trial of the charge or charges.
>
> F (2) Such withdrawal or stay shall have the effect of an acquittal on such charge or charges, unless the conviction is set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed the inquiry into or trial of the charge or charges so withdrawn or not proceeded with.

G **[20]** On that premise, I found that there was no other pending or outstanding offence against the accused before me that could be taken for consideration at the time of the learned DPP's application. As such, I found that s 171A CPC is therefore inapplicable here and therefore the invitation by the learned DPP to inquire the accused must be declined notwithstanding there being no objection from the accused himself.

H

SENTENCING

Second Issue: Sentencing

[21] For the offence of possession in dangerous drugs, s 39A(2) DDA 1952 I provides for the imposition of imprisonment for life or for a term not less than five years and whipping of not less than ten stokes.

[22] As for whipping s 289 CPC provides amongst others, that no male person above the age of 50 shall be whipped.

[23] I took into account all the factors in mitigation before sentencing the accused to 15 years imprisonment. I acknowledged the fact that the accused being a first offender and who had pleaded guilty is entitled to be given some discount or credit (the cases of *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; *Public Prosecutor v Sulaiman Bin Ahmad* [1993] 1 MLJ 74; *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; *Mohamad Abdullah Angsweekang v PP* [1987] 2 CLJ 405 referred to).

[24] However, those two are but minor factors compared to public interest which supercede other considerations. Although the accused is entitled to some credit for pleading guilty and being a first offender, that must be set off against the seriousness of the crime committed (the case of *PP v Yap Huat Seng* [1985] 2 MLJ 414 referred to).

[25] In the case of *PP v Sidek Abdullah* [2006] 1 CLJ 314, Hishamudin Yunus J, sentenced the accused who had pleaded guilty to an amended charge of having in possession 44,023.3 grams cannabis to 12 years imprisonment. In comparison, the amount of drugs involved in our case is substantially more (54,571.18 grams).

[26] As such after having considered all the relevant factors, I accordingly sentenced the accused to 15 years imprisonment to take effect from the date of his arrest. A lighter sentence, I feel, would make a mockery of the principle of sentencing and the intention of Parliament. As for the sentence of whipping, pursuant to s 289(c) CPC the accused being 51 years of age was not ordered to be whipped.

Accused sentenced to 15 years imprisonment from date of arrest.

Reported by Navit Kaur Randhawa